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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. ~~876~~ 130

ALVIE D. KILLIAN,

*Petitioner,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY and P. R. MALLORY & CO., Inc.

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT, and BRIEF IN SUPPORT THEREOF.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 868

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable The Supreme Court of the United States:*

The Petitioner, Alvie D. Killian, respectfully petitions this Honorable Court as follows:

1. To review the judgment of the Appellate Court of Illinois, First District, in the above cause which judgment was entered December 13th, 1948 (R. 173) and became final upon the denial of Petition for Leave to Appeal from the Appellate to the Supreme Court of Illinois, March 22nd, 1949 (R. 224).

2. For a Writ of Certiorari to the Appellate Court of Illinois, First District, for that purpose.

In this behalf, Petitioner shows:

## I.

## SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This suit was brought by Petitioner in the Superior Court of Cook County, Illinois, against The Pennsylvania Railroad Company [1] under the Federal Employers' Liability Act [2] and against P. R. Mallory & Co., Inc., [3] at Common Law, jointly, to recover damages for injuries received by Petitioner as an employee of Pennsylvania and an invitee in the Mallory plant at Gary, Indiana, on July 18th, 1945 caused by the negligent failure of Respondents to make his place of work reasonably safe (R. 41, 42).

The case was tried to the Court and jury. The usual motions to direct a verdict were made and overruled (R. 52, 53). The jury returned a verdict finding defendants guilty and assessing damages in the sum of $10,000.00 (R. 66).

Motions for judgment notwithstanding the verdict and for a new trial were made and overruled and judgment entered on the verdict (R. 66, 67, 69-79).

Defendants appealed from the judgment to the Appellate Court of Illinois, First District.

The questions raised on the appeal were (R. 14-15):

1. By Pennsylvania:

a) There is no proof that the Pennsylvania was guilty of any negligence, however slight, that contributed to the plaintiff's injuries.

---

1 Hereinafter referred to as "Pennsylvania."

2 35 Stat. 65, 45 U.S.C.A. Secs. 51-60.

3 Hereinafter referred to as "Mallory."

b) The Pennsylvania was, under firmly settled law, entitled to a directed verdict or to a statutory judgment notwithstanding the verdict.

2. By Mallory:

a) The Plaintiff was guilty of contributory negligence as a matter of law and as a matter of fact, and therefore a verdict should have been directed for this defendant.

b) The verdict is contrary to the manifest weight of the evidence.

No questions were raised as to the admission or refusal to admit evidence; the giving or refusing to give instructions; the amount of the verdict, or as to any other matter or incident occurring at the trial.

Mallory questioned the weight of the evidence but did not seriously argue the question.

The Appellate Court, on the ground that the Petitioner was the Pennsylvania Railroad and, himself, responsible for making the place of work safe, held that the trial court should have directed the verdict requested in favor of each Respondent and reversed the judgment of the trial Court.

Petition for rehearing was filed and denied (R. 174, 175).

Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois was seasonably filed (R. A.) and was denied March 22, 1949 (R. 224).

Petitioner contends that in reaching the above conclusion the Appellate Court of Illinois, First District, deprived Petitioner of a jury trial in a case in which the undisputed facts strongly supported the verdict of the jury and thereby the Court ruled contrary to the provisions of the Federal Statute, 45 U. S. C. A., Section 51, and the principles of law announced by this Court in *Wilkerson* v.

*McCarthy*, 336 U. S. 53, 69 S. Ct. 413; *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, 69 S. Ct. 275; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598; *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545.

The effect of the decision is to deprive Petitioner of his right under the Constitution of the United States to have his case tried by a jury.

## II.

## JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress, 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60) April 28, 1908, as amended.

## III.

## THE QUESTIONS PRESENTED.

The ultimate questions to be decided in this case are:

1. In this case, involving federal rights under the Federal Employers' Liability Act, did the Appellate Court err in holding that the trial Court should have directed a verdict as to each Respondent?

2. Was there sufficient evidence of negligence on the part of Pennsylvania in failing to use ordinary care to furnish Petitioner a reasonably safe place in which to perform his duties to justify the trial Court in submitting the case to the jury and to require the Appellate Court of Illinois to abide by the verdict rendered by the jury?

3. Did Petitioner, by reason of the fact that he was conductor in charge of the operation, become the vicarious agent of either or both Respondents with respect to the existing dangerous condition of the place of work, so as to deprive him of his employee status entitling him to the benefits of the Act?

4. Did the Appellate Court's conclusion that the trial Court should have directed a verdict for each of the Respondents, deprive the Petitioner of his constitutional right to the benefit of the jury's verdict in a case in which there is a reasonable basis to be found in the evidence for the verdict in his favor?

## IV.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

It is alleged in the Complaint (R. 42) and admitted in Pennsylvania's Answer that Petitioner was an employee of Pennsylvania and that at the time of the accident, both Petitioner and Pennsylvania were engaged in interstate commerce (R. 49).

Section 1 of the Act, as amended in 1939[4], among other things, provides:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth, shall, for the purposes of this Chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Chapter."

The Appellate Court in its opinion said (R. 5):

> "At the time and place of this accident, according to his own testimony, plaintiff himself was the agent of the railroad company charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties."

And again the Court said (R. 8):

> "We are of the opinion that the Plaintiff should not claim damages for injuries resulting from a dangerous condition which, by omission to do his duty, he, himself, creates."

---

[4] 53 Stat. 1404, 45 U.S.C.A., Sec. 51.

Only on this erroneous theory of Petitioner's status could the Court have found that Pennsylvania was free from any negligence and that Petitioner was guilty of such contributory negligence as to bar his action against Mallory.

Petitioner merely testified that he was conductor in charge of the movement and as such was responsible for getting the train safely into and out of the plant. He did not testify that that duty extended to making the place a safe place in which to perform his duties.

His duties were all determined by the order of his superiors in the employe of Pennsylvania to deliver a car of coal in the Mallory plant and the evidence is not disputed that the track over which he must proceed to perform those duties was always covered with barrels, cylinders, steel and everything that came out of the plant (R. 93, 97, 115, 126).

Neither is it disputed that both Pennsylvania and Mallory were repeatedly warned of this condition (R. 94, 132).

There is no evidence in the record that he failed to perform any duty growing out of the nature of his task.

The evidence amply shows that these duties occupied all of his time prior to the accident, one of which duties was to flag a crossing while other crew members removed an empty coal car from the plant preliminary to the spotting of the loaded car of coal (R. 94, 95, 97, 158, 159).

From all of this evidence the jury could and undoubtedly did infer that his failure to look and see that one of the barrels had not been moved by Mallory's gate man far enough for safe clearance, was due to his occupation with these duties, and that he could justifiably rely upon other crew members who had twice moved over the track with the train after Mallory's gateman had removed the stuff

from the track at Petitioner's direction and prior to the accident, to detect and warn him of the close proximity of the barrel which was still a part of the mass of barrels and stuff allowed to be and remain on the track by Respondents.

The Court's decision went against Petitioner, solely on the theory that he, because he was conductor in charge of the movement, was the alter ego of both the Pennsylvania and Mallory, and was therefore chargeable with the duties to make the place safe for the performance of his duties. Petitioner was therefore treated as an employer and not as an employee under the Federal Act and on that basis deprived of the benefit of the jury's verdict.

For these reasons the judgment of the Appellate Court is not only contrary to principles announced by this Court in the cases above cited, but is contrary to the provision of the statute itself, quoted above.

For all of these reasons this Court should allow the writ in order that it may exercise its power of supervision in a case involving rights under a federal statute.

**Prayer.**

Wherefore, for the reasons above given, Petitioner respectfully prays that a writ of certiorari be issued to the Appellate Court of Illinois, First District, to the end that this cause may be reviewed and determined by this Court and that the judgment of the Appellate Court of Illinois be reversed and for such other and further relief as to the Court shall seem just.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

### OPINION BELOW.

*Killian* v. *Pennsylvania R. Co., et al.*, 336 Ill. App. 152, 63 N. E. (2nd) 834, (abstract only); R. 1-13 (opinion in full).

### II.

### JURISDICTIONAL STATEMENT.

This Court's jurisdiction is invoked under Title 28 United States Code, Judiciary and Judicial Procedure, Section 1257, Paragraph 3, Public Law 773, 80th Congress 67, effective September 1, 1948.

The judgment to be reviewed is a final judgment rendered by the highest Court of the State of Illinois in which a decision could be had under Illinois law making an Appellate Court judgment final upon denial by the Supreme Court of Petition for Leave to Appeal from the Appellate Court to the Supreme Court of Illinois.

The judgment is a decision involving rights, privileges and immunities specially set up or claimed by Petitioner under a United States Statute, The Federal Employers' Liability Act, 35 Stat. 65 (45 U. S. C. A., Secs. 51-60) April 28, 1908, as amended.

## Statutes Involved.

1. Every common carrier by railroad while engaging in commerce between any of the several states * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.[5]

2. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.[6]

---

[5] 35 Stat. 65, Sec. 1; 53 Stat. 1404, Sec. 1; Title 45 U.S.C.A., Sec. 51.
[6] Section 1257, Public Law 773, 80th Congress, 67.

## III.

## QUESTIONS PRESENTED.

The ultimate questions to be decided in this case are:

1. In this case, involving federal rights under the Federal Employers' Liability Act, did the Appellate Court err in holding that the trial Court should have directed a verdict as to each Respondent?

2. Was there sufficient evidence of negligence on the part of the Pennsylvania in failing to use ordinary care to furnish Petitioner a reasonably safe place in which to perform his duties to justify the trial Court in submitting the case to the jury and to require the Appellate Court of Illinois to abide by the verdict rendered by the jury?

3. Did Petitioner, by reason of the fact that he was conductor in charge of the operation, become the vicarious agent of either or both Respondents with respect to the existing dangerous condition of the place of work, so as to deprive him of his employee status entitling him to the benefits of the Federal Employers Liability Act?

4. Did the Appellate Court's conclusion that the trial Court should have directed a verdict for each of the Respondents, deprive the Petitioner of his constitutional right to the benefit of the jury's verdict in a case in which there is a reasonable basis to be found in the evidence for the verdict in his favor?

## IV.

## SUMMARY OF THE ARGUMENT.

There is an abundance of evidence in the record to sustain the verdict of the jury.

The Appellate Court adopted the untenable theory that Petitioner, by reason of the fact that he was conductor in charge of the operation, became the vicarious agent or alter ego of Pennsylvania; that the duty of Pennsylvania to make the place of work safe became Petitioner's duty and that if the place was unsafe it was because Petitioner failed to perform this duty to make it safe.

In reaching this conclusion the Court pushed aside the evidence bearing upon the failure of Pennsylvania to perform its duty to provide a safe place for its employees to work and selected the point in the evidence when the train was moving over the track on its third trip after the barrels had been removed from the track and Petitioner swung on to the leading car at Moore Avenue, so as to be in a position to spot the loaded coal car at the delivery point.

The Court also pushed aside the fact that Petitioner was engaged immediately prior to the accident in flagging the crossing at Moore Avenue to prevent injury to Mallory's employees and to keep trucks from blocking the tracks and from striking or being struck by the train.

In ignoring all of this evidence, the Court treated the barrel or barrels that caused the accident as being wholly unconnected with the mass of barrels and other stuff that Respondents had allowed to clutter up the track, which was the place of work for Petitioner and other employees; treated Petitioner as the alter ego of Pennsylvania; placed the responsibility for the position of that barrel

upon Petitioner and thus relieved Pennsylvania from any negligence whatsoever and found Petitioner, himself, guilty of negligence, so as to bar his action insofar as Mallory was concerned.

The Court thus recast Petitioner, an employee, in the role of the Railroad and Mallory in respect to the safety of the place and the premises and deprived him of the benefit of the jury's verdict based upon all of the evidence including that pushed aside by the Court.

The judgment of the Appellate Court, based as it is upon the narrow and erroneous theory it adopted, violates the applicable principles announced by this Court; violated Section 1 of the Federal Employers' Liability Act by taking Petitioner from under its provisions in making him the Master instead of the Servant entitled to the benefit of the provisions of the Act and is, for these reasons erroneous and should be reviewed and reversed by this Court.

## V.

## STATEMENT OF FACTS.

Petitioner is an employee of Pennsylvania. He began work October 15, 1913 as a brakeman. He was promoted to conductor (R. 92) and had thirty-two years of experience in railroading.

He had been in and out of the Mallory plant over a period of years and had, at the time of the accident, been on Job 12B, on which he was engaged at the time of the accident, for five or six weeks (R. 93).

The crew on this job consisted of an engineer, a fireman, two brakemen and a conductor. On July 18, 1945, the date of the accident, plaintiff was acting as conductor (R. 108).

The following Rules of Pennsylvania were on that date in effect:

Rule 103a (R. 107):

When a train is shifting over a public crossing at grade not protected by a watchman nor by gates, a member of the crew must protect the crossing in advance of each movement over the crossing unless otherwise provided.

Rule 106 (R. 157):

*Both the conductor and the engineman* are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection. *They shall require assistance from the trainmen and firemen in all things requisite for the safe and prompt movement of their train.* (Italics ours.)

Rule 108 (R. 109):

In case of doubt or uncertainty the safe course must be taken.

Safety Rule 1507 (R. 157):

On Engines, Cars or Trains.

* * *

Maintain lookout in the direction engine or car is moving, to avoid coming in contact with structures alongside of or over track, or with cars, engines, or trains on adjacent tracks. (Bridges, buildings, coal chutes and aprons, fences, cattle guards, mail cranes, platforms, poles, stock chutes or pends, switch standards, lamps, targets, signals, tunnels or standpipes, etc.)

This paragraph follows a half dozen other paragraphs in the Rule Book, under the heading, Rule 1507, "On Engine, Cars or Trains" prohibiting all trainmen generally from (1) hanging on car door; (2) standing between one car and lumber or pipe on another car; (3) sitting or standing on side of roof of box car; (4) sitting on runningboard of tank or flat cars; (5) jumping from roof of closed car to open top car; (6) throwing refuse from moving trains.

Thus the "lookout" paragraph, which is number 7 in this list under rule 1507, obviously does not place sole responsibility on any one member of the crew.

Petitioner, as conductor, was in charge of the movement into the Mallory plant. He got his orders, copies of which were given to the engineer, from the Yardmaster, who was his superior. He was given a switching list which was the order to spot a loaded car of coal in the Mallory plant (R. 108). His duties in the Mallory plant that day were to do what was necessary to execute that order.

The track and right of way in the Mallory plant over which the crew on Job 12B must travel into the plant was always, and was on July 18, 1945 piled with oil drums, machinery, cylinder, steel, and everything that comes out of the Mallory plant (R. 93, 97, 115, 126).

Petitioner and others had, prior to the date of the accident, often complained about this condition to the Mallory people and to one Bergman, Safety Director of the Pennsylvania, and to that Respondent's Yardmaster, Sennett (R. 94, 132), but nothing had been done about the condition by either Respondent.

When the crew arrived at the gate of the Mallory Company on July 18, 1945, the train was stopped there. The policeman or guard on duty there opened the gate. His name was Larry Turner. Petitioner entered the Mallory premises, saw the stuff, including the oil barrels, on the track, and ordered Turner to move them off so the train could come in and spot the coal car. He then walked to the end of the tracks to the north to see that the rest of the track was clear (R. 94, 96, 123, 126).

The engineer and other members of the crew, after the stuff was moved from the track, brought the train into the plant and up to the north end where the Petitioner was and

picked up an empty coal car that had to be removed before the loaded car could be spotted. Petitioner rode back to Moore Avenue between the loaded and the empty cars (R. 96).

While the other members of the crew were setting out the empty car over in the Pennsylvania yards, Petitioner, in compliance with Rule 103a, guarded the Moore Avenue crossing to prevent injury to Mallory employees who crossed there to get to the commissary. At the same time he kept the trucks from backing on the track to get to the loading platform, and from blocking the train coming back up the track (R. 95, 96, 97, 158). Petitioner testified (R. 158-159):

> "When I was guarding this crossing at Moore Avenue, and the train was crossing from (with) our engine, a car was coming from the South. I was watching that train and engine coming, coming along there from the South, to see nobody got (ran) into it, or nobody got run over or hit.
>
> "I was facing East and South, and these oil drums were north of me.
>
> • • •
>
> "At the time I stepped on that sill step, I was standing about four feet from the loading pit, and at that time these drums I talk about were to the left.
>
> "I know they had been there. I had ordered them moved.
>
> "There was something there to obstruct my seeing them there. I was watching the traffic in the different directions.
>
> "There was nothing between me and the drums.
>
> "The traffic from the other direction prevented me from looking to the left at the time."

It was about twenty minutes from the time petitioner ordered Turner to remove the barrels and stuff from the track till the accident happened (R. 132). The train had twice traveled over the track after the barrels were

removed. As the leading car, the coal car, passed over Moore Avenue on its third trip over the track, Petitioner caught the ladder on the leading Northwest corner, so as to be in position to spot the car at the unloading point. He immediately saw the barrels, tried to swing around the corner of the car to avoid them, but his right leg was caught between one or more of the barrels and the car and injured (R. 99, 100).

Petitioner was the only witness that testified in connection with the merits of the case. Neither Respondent called any fact witness at the trial and there is no explanation as to why Bergman, the safety director; Sennett, the yardmaster; or Turner or some other representative of Mallory, was not called by the Respondents.

## VI.

## SPECIFICATIONS OF ERRORS TO BE URGED.

The Appellate Court of Illinois, First District, erred:

1. In holding that the Petitioner and not the Respondents had the duty of making his place of work a safe place in which to perform his duties;

2. In failing to base its judgment upon all of the evidence in the record;

3. In substituting its judgment for that of the jury as to the cause of the accident and injury to the Petitioner and in finding that Pennsylvania was not negligent and that Petitioner, himself, was guilty of such negligence as to bar his action against Mallory;

4. In depriving Petitioner of the benefits as an employee under the Federal Employers' Liability Act and of the verdict of the jury;

5. In reversing the judgment of the Superior Court of Cook County.

## VII.

## ARGUMENT.

### A.

**The Appellate Court erred in holding that the Trial Court should have directed the verdict requested in favor of Respondents and in reversing the judgment of that Court.**

The gist of the petitioner's cause of action against the Respondents as stated in the Complaint is:

1. As to the Pennsylvania (R. 45):

The defendant, The Pennsylvania Railroad Company, was careless and negligent in failing to use ordinary care to provide the plaintiff with a reasonably safe place in which to work.

2. As to the Mallory Company (R. 47):

Defendant, P. R. Mallory and Co., Inc., was careless and negligent in failing to use ordinary care to provide the plaintiff, as their invitee, with a reasonably safe place to work.

The evidence supporting these allegations of the Complaint may be summarized as follows:

1. Petitioner and his fellow crew members were directed by Pennsylvania's Yardmaster to deliver a car of coal billed to the Mallory Company. This necessitated the removal of an empty coal car standing at the point in the Mallory Plant where the car loaded with coal was to be spotted for unloading by Mallory.

2. When petitioner and the other crewmen reached the Mallory plant with the train, Mallory's gate man opened

the gate through which the train must pass to reach the delivery point.

Petitioner entered the plant ahead of the train, saw the oil barrels and other material on the track over which the train must proceed. He ordered the gate man to move or cause the barrels and other material on the track to be removed so the train could reach the delivery point.

Petitioner then proceeded along the track to the delivery point where the empty car was standing to see that that part of the track was clear.

3. When the track was cleared the other crewmen brought the train over the track to the delivery point and petitioner saw that the coupling between the empty and loaded coal cars was made. He rode between these two cars back to Moore Avenue.

4. Petitioner then watched the crossing to prevent injury to cars or trucks and persons passing along Moore Avenue over the tracks and to prevent trucks from backing up over the track to the platform and blocking the track. He performed these duties and gave no further attention to the barrels, since the train had passed twice over the point from which the barrels had been removed.

5. The condition of the Mallory premises on and in the vicinity of the track, as found by Petitioner upon entering the plant ahead of the train that day, was not unusual. It was always that way, piled with barrels, machinery and other stuff that came out of the plant. Petitioner and other crewmen had on previous occasions complained about it to Mallory and to the Safety director and Yardmaster of the Pennsylvania and had requested that the dangerous condition be remedied.

6. When the train returned from setting out the empty car over in the Pennsylvania Yards, Petitioner swung

onto the leading northwest corner of the loaded coal car as it passed him to be in position to spot the car at the delivery point.

7. The barrels or one or more of them had not been moved by Mallory's man far enough to clear a man riding as petitioner was on the side ladder of the loaded car. Petitioner could assume that the barrels had been moved from the track since the train had made two trips over it subsequent to his order for their removal. He evidently thought no more about the barrels for that reason and for the further reason that he was busy keeping trucks off the track and watching the crossing at Moore Avenue.

Furthermore he could assume, under the lookout rule, that if the barrels were still in dangerous proximity to the track, the engineer, fireman, or some other member of the crew would have noticed it in the two previous trips over the track and would have moved or caused them to be moved to a safe distance or would have reported to him about the close clearance.

8. The barrel or barrels that injured Petitioner were still a part of the general mass of barrels and other material on the track that had been placed and left there by Mallory and which made up the general continuing condition about which complaints had been made to both Respondents on previous occasions and requests made that the dangerous condition be removed.

9. These facts are undisputed. Petitioner was the only fact witness at the trial. Respondents produced no fact witnesses, though other members of petitioner's crew and Mallory's men were available. No explanation was made as to why they were not called.

10. There is no evidence tending to show that petitioner failed to perform any duty imposed upon him by the rules

of his employer or any duty required of him by his orders under which he was sent into the Mallory plant.

The law applicable to these facts and the charges in the complaint:

1. As to Pennsylvania:

(a) *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 63 S. Ct. 1062, 1064:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. (authorities) That rule is deeply engrained in federal jurisprudence. (authorities). As stated by this court in the *Patton* case it is a duty which vecomes 'more imperative' as the risk increases. Reasonable care becomes, then, a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery, (authorities). That duty of the carrier is a 'continuing one' (authorities) from which the carrier is not relieved by the fact that the employees' work at the place in question is fleeting or infrequent."

(b) *Divine* v. *Delano*, 272 Ill. 166, 176, 111 N. E. 742:

> "It is undoubtedly true that many duties required of employees in the work of a railroad company are attended with danger, and can only be carried on by means that are hazardous and dangerous to those who enter into such employment. Where no necessity, however, exists for the operation of such railroad under dangerous conditions and where it only requires care and skill to make such conditions safe, 'there is no reason why an employee should be subjected to dangers wholly unnecessary to the proper operation of the business of the employer. (*Choctaw etc. Railroad Co.* v. *McDade*, 191 U. S. 64.) Plaintiffs in error were not required by law to operate these switch tracks in the yard of this manufacturing plant under conditions dangerous to their employees if it was practicable and feasible for such dangerous conditions to be removed. If the railroad company had no such control as to be

> able to remove such dangerous conditions itself it could require the owners of the plant to change these conditions, or refuse until such change, to do such switching."

There is no defense of contributory negligence as a bar to the action or assumption of risk open to Pennsylvania. 45 U. S. C. A. Sect. 53, 54. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63, Set. 444.

2. As to Mallory:

*National Builders Bank* v. *Schuham*, 319 Ill. App. 546, 552, 49 N. E. (2nd) 825:

> "All the authorities agree that it is incumbent upon the owner of premises upon which persons come by invitation, express or implied, to maintain such premises in a reasonably safe condition for the contemplated uses thereof for which the invitation was extended."

The questions to be decided in this case, both in the trial and Appellate Court, were (a) whether these duties, respectively, of the two Respondents had been kept, (b) whether, if not kept, Petitioner's injuries were the result of the failure to keep them and as to Mallory (c) whether Petitioner was in the exercise of ordinary care for his own safety.

These questions, which were preeminently for the jury, were, by the verdict, decided in favor of the Petitioner.

**(a)**

**Petitioner was not the Alter Ego of Pennsylvania.**

Questions (a )and (b) were not considered by the Appellate Court in its opinion. That Court adopted the astounding theory that Petitioner and not the Respondents had the duty to make the premises safe:

The Appellate Court says:

"It does not appear that the railroad company had any duty to maintain the premises in question which was owned and maintained by the defendant Mallory Company. The only theory upon which the railroad company could be charged with failing to use reasonable care in affording plaintiff a safe place to work was in the failure to keep the track clear of impedimenta. At the time and place of this accident, according to his own testimony *plaintiff himself was the agent of the railroad company* charged with the duty of keeping this spur track clear for the safe movement of his train. Under such circumstances, this became a safe or an unsafe place to work according to whether or not plaintiff performed or failed to perform his duties. (Italics ours.)

* * *

"We are of the opinion that the plaintiff should not claim damages for injuries resulting from a dangerous condition which, by omission to do his duty, he himself creates.

* * *

"We are of the opinion that even though the other members of the crew might have determined the presence of a dangerous instrumentality adjacent to the tracks, that they were not required, in the exercise of ordinary care, to, anticipate that the plaintiff would thrust himself into such a position of danger."

In discussing the Mallory Company phase of the case, the Court says:

"In the instant case the facts are not disputed. They have been fully reviewed here. Plaintiff admits that although he was standing only ten or twelve feet from this position of danger and although he had a duty to maintain a lookout in the direction his train was moving, that he did not look before boarding the train to see whether the barrels were on or off the track and that he paid no attention to the barrels before he got on the train, *although he had previously had warning that the barrels were so close to the track as to prevent clearance.*"

Thus the Court fails to consider the case presented by the evidence.

For the reason that Petitioner was the conductor in charge of the movement, the Court recasts him in a character which is the composite of the Pennsylvania and Mallory; ignores the duties he was sent into the plant to perform for the benefit of both Respondents and clothes him with the sole duty of cleaning up the Mallory premises.

The conclusion reached on this narrow and erroneous view of the case could be reached only in a case where an employee is directed to go into a dangerous place for the very purpose of making that place safe. If that were the case here, the decision of the Appellate Court might be defended. But that is not this case.

Here Petitioner was not sent into the Mallory plant to clean up the track on the Mallory premises, so as to make it safe for the Pennsylvania to send its employees upon them to further its business with the Mallory Company. His sole duty there was to complete a business transaction between the two companies by delivering a car of coal, not as an agent of Pennsylvania, but as one of its employees. He performed that duty in the usual an customary manner, as well as all the duties required of him as an employee, including the duty to use ordinary care for his own safety in the circumstances in which the evidence shows those duties were required to be performed.

As conductor, petitioner was of course in charge of the movement. But he was just an employee along with the other members of his crew. He was hired by Pennsylvania just as other members of the crew were hired. He was promoted to conductor, but this could not work a change in his employer's duties toward him and did not change his original contract of employment or make him an agent

of his employer to perform functions unrelated to his duties as an employee.

The duties of every member of the crew, including the Petitioner, were fixed by the nature of their mission and by the rules promulgated by their common employer.

Petitioner and the engineer were jointly responsible for the safety of the train. The other crewmen were required to render assistance in this respect. Everyone was required to keep a lookout to the end that the train could enter and leave the plant in safety. One of the purposes in having five crewmen on such a movement is that where one crewman, for any reason, overlooks something that threatens the safety of the train, there will be four other men, one or more of whom, may discover the danger.

The Appellate Court had these rules before it but chose to take and misconstrue Petitioner's statements at the trial that he was in charge of train and was responsible for its safety, into an assertion that he was responsible for making the premises safe.

There is no question but that had anything happened to the train itself, Petitioner, as the superior crewman, in that respect, might have had the ultimate responsibility. But ultimate responsibility for the safety of the train is one thing, responsibility for the safety of the place in which he and the other crewmen were required to perform their duties, as employees of the railroad and as invitees of the Mallory Company, is an entirely different thing. That was the responsibility of the two Respondents.

Petitioner in his testimony, singled out and relied upon by the Court in deciding the case against him, was talking about his responsibility in the first sense and not in the second sense of being responsible for the safety of the place of work. Even had he, under the insistent cross

examination of the two lawyers for the Respondents, made such a claim of responsibility, the Court would be required to rely upon the true fact, if it appears from the evidence, and not upon some wild expression elicited from a witness on cross examination by lawyers, out to destroy damaging testimony. But he made no such claim. In any event the true facts as to Petitioner's duties and responsibilities as well as that of the Respondents were in evidence.

**(b)**

**The evidence justified the submission of the case to the jury and was such as to require the Appellate Court to abide by the verdict.**

The province of the Court, in connection with the questions here presented, whether it is a trial court or a court of review, is so well established as to need no citation of authorities. However, the following authorities may be cited:

*Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 32:

> Petitioner was required to present probative facts from which negligence and the causal relation could be reasonably inferred The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. *Galloway* v. *United States*, 319 U. S. 372, 395; *Atchison T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of twelve persons.

*Lavender* v. *Kurn*, 327 U. S. 640, 653:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded

men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.

*Merlo* v. *Public Service Co.,* 381 Ill. 300, 311, 45 N. E. (2nd) 665:

> The Civil Practice Act and Rule 22 of this court require the court to be governed by the same rules in passing upon a motion for judgment notwithstanding the verdict as govern it in passing upon a motion for a directed verdict. The power of the court is the same in both cases, the reason being that the motions are, in effect, the same. These motions present only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiffs' case.

*Lasco* v. *Meier,* 394 Ill. 71, 67 N. E. (2nd) 162, 167:

> "Appellant further contends that the court erred in not directing a verdict in his favor, for the reason, as he says, that the plaintiff was guilty of contributory negligence as a matter of law, in failing to warn the driver of the approach of the other automobile. The question whether a plaintiff has been guilty of contributory negligence is ordinarily and preeminently a question of fact, upon which he is entitled to have the finding of a jury. It can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence."

*Moffit* v. *O. L. D. Forwarding Co.,* 331 Ill. App. 278, 73 N. E. (2nd) 164, 167:

> "The question of contributory negligence is preeminently for the consideration of the jury, as such negligence cannot be defined in exact terms, and unless

it can be said that the action of the injured person is clearly and palpably negligent it is not within the province of the court to substitute its judgment for that of the jury. *Blumb* v. *Getz,* 366 Ill. 273, 277, 8 N. E. 2d 620. Before the question of contributory negligence can be said to be established as a matter of law, the conduct of the injured party must have been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent. *Hellwig* v. *Lomelino,* 309 Ill. App. 369, 375, 33 N. E. 2d 174."

*Malone* v. *Suburban Transit Co.,* 64 F. Supp. 859, 863:

"Where the nature and attributes of an act relied on to show negligence contributing to an injury sustained as a proximate cause thereof, can only be determined correctly by considering all the attending and surrounding circumstances of the accident it falls within the province of the jury to pass upon and characterize it and it is not for me to determine its quality as a matter of law."

The Appellate Court adopted defense counsel's theory of the case. That theory was presented to the jury along with petitioner's theory. The jury adopted petitioner's theory which is based upon all of the facts and circumstances in evidence. This fact, after the jury has returned its verdict, does away with the "all reasonable and unbiased minds" rule and substitutes for it the rule that if there is a reasonable basis in the evidence for the jury's verdict, that verdict must stand.

In *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 749, 67 S. Ct. 598, this Court says (page 600):

"The choice of conflicting versions of the way the accident happened, the decisions as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tenant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Lavender* v. *Kurn, supra.* Once there is a reasonable basis in

the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender* v. *Kurn, supra,* 327 U. S. at page 652, 66 St. Ct. at page 743. And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. *Washington & Georgetown R. Co.* v. *McDade,* 135 U. S. 554, 472, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 68, 63 S. Ct. 444, 451, 87 Ld. Ed. 610, 143 A. L. R. 967.

"We think the evidence raised substantial questions for the jury to determine and that there was a reasonable basis for the verdict which it returned."

The Appellate Court had these established principles before it. But the Court adopted the farfetched theory that Petitioner was the Pennsylvania Railroad (R. 190) and relied upon authorities decided upon facts and circumstances wholly different from those in the case before it.

The Court, on the Pennsylvania phase of the case relied upon cases, plainly distinguishable on their face.

In *Hylton* v. *Southern Railway Co.,* 87 F. (2nd) 393, 395, Hylton disobeyed a positive order to watch for a steel gang ahead of him laying rails and voluntarily released the brakes on a grade resulting in the derailment of the train and his consequent death.

The case was decided prior to the 1939 amendment removing assumption of risk from these cases [7] and the court held that he assumed the risk of injury resulting from the method of operating the train down grade without turning up retainer valves.

There is no contention or evidence in this case that petitioner violated any positive order and it cannot be

[7] *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 63 S. Ct. 444.

said, in the circumstances of this case in the face of the jury's verdict to the contrary, that he violated the general safety rule requiring all crew men to look out for structures along the track.

In *Eckenrode* v. *Pennsylvania R. Co.*, 71 F. Supp. 764, 768, Eckenrode put his head into the driving wheels of the engine in a voluntary attempt to put sand on the rails, to keep the wheels from slipping. His head was crushed, causing his death. Obviously, there is no similarity of fact or circumstance between that case and the case at bar. The judgment in the case was affirmed by the United States Court of Appeals and that court's judgment was affirmed by this Court in a recent decision in the case.[8]

In *Davis* v. *Hand,* 290 F. 73, the dangerous clearance of the obstruction involved was obvious and known to the plaintiff. He gave the signal to the engineer to move ahead and unnecessarily took a dangerous, instead of several safe positions open to him. The case was decided in 1923, long before the 1939 amendment, when as stated by Mr. Justice Black in the *Tiller* case, assumption of risk was often applied under the name of contributory negligence. The case is very similar in many respects to *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 749, 67 S. Ct. 598, cited above, where this Court came to a different conclusion.

In any event the case can have no bearing in the case at bar.

Pennsylvania could not delegate its duty to furnish petitioner a safe place to work any more than could the court shift the burden of its duty to Petitioner.

The rule in Illinois is, as stated in *Porter* v. *Terminal R. Assn. of St. Louis,* 327 Ill. App. 645, 65 N. E. (2nd) 31, 33:

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[8] *Eckenrode* v. *Penn. R. Co.,* 164 F. (2d) 996, 335 U. S. 329, 69 S. Ct. 91.

> "It is the duty of the Master to furnish the servant with a reasonably safe place to work. * * * and this duty follows the Master even though the servant is sent upon the premises of another to do his work. This duty is non-delegable and affirmative, and must be continuously fulfilled and positively performed."

Among the numerous authorities cited by the Court in support of this statement of the rule are: Shearman and Redfield on Negligence, Rev. Ed., Vol. 2, Secs. 193 *et seq.*, and *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 63 Sct. 1062, 87 L. Ed. 1444. See also *Divine* v. *Delano*, 272 Ill. 166, 176.

The undisputed and uncontradicted evidence in this case establishes beyond question that Pennsylvania violated this duty and was guilty of negligence.

In the Mallory phase of the case the Court cites *Illinois Central R. R. Co.* v. *Oswald*, 338 Ill. 270, where plaintiff drove her automobile across a bridge into a volume of dense black smoke and was struck by another car while the smoke blocked the view. She then left her car and got out into the smoke to see what caused the accident and was struck by a third car. Clearly, the case is not authority here.

*Prill* v. *City of Chicago*, 317 Ill. App. 202 and *Keele* v. *Atchison, T. & S. F. Ry. Co.*, 258 Mo. 62 (167 S. W. 433), cited by the Court state correct principles of law, but it is well settled law that whether the principles announced in one case apply in any other case, depends upon the facts and circumstances of each case. The cases are not applicable here.

The Court does not cite any recent case or any case that could sustain its position here that the Petitioner and not the Respondents had the duty of making the place of work where Petitioner and his fellow crew members were re-

quired to perform their duties in furthering the business interests of both of these Respondents, a reasonable safe place.

(c)

The Court, thus, on a wholly erroneous theory deprived Petitioner of the benefits of the jury's verdict and of his constitutional right to have his case tried by a jury.

**Conclusion.**

The device or theory adopted by the Appellate Court of Illinois to overturn the verdict and judgment of the Superior Court of Cook County ignores the probative evidence in the record and the law applicable to that evidence. The Court's failure to consider the evidence and the applicable law, led to the result that Pennsylvania was not guilty of any negligence and that Petitioner was guilty of contributory negligence. Only upon this narrow and ironious view of the case could the Court reach its conclusion that the trial court should have directed a verdict as to both Respondents.

For these reasons, Petitioner urges that the writ prayed for in the Petition be granted; that the judgment of the Appellate Court of Illinois, First District, be reviewed and reversed by this Court and that the judgment of the Superior Court of Cook County be affirmed.

Respectfully submitted,

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